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Walter D. Cruickshank
Acting Administrator, Minerals Management Service
Department of Interior
c/o Rules Processing Team
381 Elden St, MS-4024;
Herndon, VA 20170-4817

Submitted via email at rules.comments@mms.gov on February 28, 2006

Dear Mr. Cruickshank:

Re: Alternate Energy-Related Uses on the Outer Continental Shelf, RIN 1010-AD30

Food and Water Watch, a nonprofit consumer rights organization that challenges corporate control and abuse of our food supply and freshwater and ocean resources, is pleased to comment on the Advanced Notice of Proposed Rulemaking on Alternate Energy-Related Uses on the Outer Continental Shelf, RIN 1010-AD30 (ANPR).[1] Specifically, we direct our comments towards the "Access to OCS Lands and Resources" and "Operational Activities" programs on which the Minerals Management Service (MMS) is seeking comments. As we explain more fully below, we urge MMS to:

1) Formally adopt a policy that will disallow Outer Continental Shelf (OCS) facilities for use in commercial offshore aquaculture;

2) Maintain the position articulated in the ANPR and clarify that The Energy Policy Act of 2005 ("The Act" or "The Energy Act") does not give the MMS authority to regulate "marine-related" activities until those activities have already been authorized by another agency or statute; and

3) Clarify that new authority under The Act does not include new rigs-to-reef or rigs-to-aquaculture permitting authority.

MMS should prohibit the use of OCS facilities for commercial aquaculture.

We are very concerned about one alternate use of existing OCS facilities mentioned in the ANPR – that of offshore aquaculture, or fish farming – and the effects that the establishment of large-scale commercial fish farms in federal waters will have on the environment, human health and the economies of local fishing communities. Offshore aquaculture involves the raising of carnivorous finfish, such as cod, halibut and red snapper, in often large, crowded cages where fish waste and chemicals flush straight into the open ocean. Water flowing out of fish farms carries excessive nutrients,[2] metals,[3] pesticides[4] and other chemicals that pose potential harm to water quality and the environment.[5]

[1] 70 Fed. Reg. 77345-77348 (December 30, 2005).
[2] Strain, P.M., Wildish, D.J. and Yeats, P.A., The application of simple models of nutrient loading and oxygen demand to the management of a marine tidal inlet, 1995, *Marine Pollution Bulletin* 30:253-26.

Moreover, contaminants found in farm-raised fish may threaten public health. Studies indicate that farm-raised salmon have higher levels of chemical contaminants than wild salmon, including higher levels of PCBs, a group of known carcinogens.[6] Antibiotics used in farm-raised salmon may also harm human health by contributing to microbial resistance.[7] These concerns are relevant to the type of carnivorous finfish intended for offshore aquaculture.

Furthermore, while fish farming is touted as a way of reducing the pressure on depleted fishing populations, marine aquaculture's feed requirements may actually increase these pressures due to a necessary diet of large quantities of fishmeal and fish oil.[8] Aquaculture off the U.S. coast could also harm the existing U.S. fishing industry by lowering prices for wild fish caught by U.S. fishermen.[9]

Finally, there are particular problems in allowing offshore aquaculture on and around energy platforms. For example, there are open questions of how to ensure the safety of the aquaculture structures and who assumes liability for personal injury, property and environmental damages that arise from the use of those structures.[10] This is not to mention the liability issues surrounding lease clearance, which, as discussed below, are not addressed by The Energy Act.

Even if other agencies would or had the authority to address some of these problems in their aquaculture permitting programs,[11] MMS would still be obligated to ensure that the leases, easements or rights-of-way that it issues address safety, protect the environment, prevent waste, conserve natural resources of the OCS and prevent the interference with other reasonable uses.[12] Given the numerous environmental and socioeconomic problems with offshore aquaculture, and the large amount of resources and specific regulatory expertise that would be needed to adequately address these problems, we urge MMS to adopt a policy that will disallow use of OCS facilities for commercial aquaculture.

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[3]Scottish Association for Marine Science and Napier University, "Review and Synthesis of the Environmental Impacts of Aquaculture, 2002."
[4]U.S. Environmental Protection Agency, "Economic and Environmental Benefits Analysis of the Final Effluent Limitations Guidelines and New Source Performance Standards for the Concentrated Aquatic Animal Production Industry Point Source Category," June 2004.
[5]*Id.*
[6]Hites R.A., Foran, J.A., Carpenter, D.O., Hamilton, M.C., Knuth, B.A. and Schwager, S.J., Global Assessment of Organic Contaminants in Farmed Salmon, 303 *Science* 226 (Jan. 9, 2004), available at http://www.pewtrusts.com/pdf/salmon_study.pdf.
[7]Center for Food Safety, "The Catch with Seafood," 2005.
[8] Naylor, R.L., Goldburg, R.J., Primavera, J.H., Kautsky, N., Beveridge, M.C.M., Clay, J., Folke, C., Lubchenco, J, Mooney, H. and Troell, M., Effect of aquaculture on world fish supplies, *Nature* 405, 1017–1024 (2000).
[9]*See, for example*, Marshall, D., "Fishy Business," 2003, citing Asche, F. Bjørndal, T., and Young, J.A., 2001, Market Interactions for Aquaculture Products. *Aquaculture Economics and Management*, Vol. 5: p. 303-318.
[10]David Dougall, "Oil and Gas Views on Use and Reuse of Petroleum Structures for Mariculture," in Reggio, V.C., Jr., comp. 1996. Mariculture associated with oil and gas structures: a compendium. In: Proceedings: Fourteenth Information Transfer Meeting, November 17, 1994, New Orleans, La. OCS Study MMS 96-0050. U.S. Dept. of the Interior, Minerals Management Service, Gulf of Mexico OCS Region, New Orleans, La. 32 pp.
[11]It is not necessarily true that other agencies will address these issues in their permitting. For example, NOAA's proposed National Offshore Aquaculture Act, S.1195, which would allow the Commerce Department to permit offshore aquaculture facilities in the Exclusive Economic Zone, largely does not address liability issues surrounding using OCS facilities for commercial aquaculture, leaving MMS with the burden of dealing with such issues.
[12]Amended Section (p) (4) of the Outer Continental Shelf Lands Act, P.L. 109-58 (August 8, 2005).

Alternatively, MMS should clarify that it has no authority to regulate aquaculture or other "marine-related" activities until they are already authorized on the OCS by another agency.

At the very least, we urge MMS to maintain its current position that it will only exercise its authority over alternate uses such as offshore aquaculture when deciding whether OCS facilities should be converted for alternate uses and only after those activities have already been authorized by another agency.[13] We urge MMS to clarify an assertion in the ANPR that might lead one to conclude that MMS interprets The Act to give it broad and general permitting authority over alternate uses.[14]

Indeed, nothing in The Act's language or legislative history gives MMS such authority. Assuming that any and all regulatory authority that MMS has over alternate uses such as offshore aquaculture is derived from The Act's amended Section (p) (1) (D) of the Outer Continental Shelf Lands Act, which gives the Secretary of Interior (Secretary) the authority to issue leases, easements or rights-of-way for "authorized marine-related" uses, it is clear from The Act's text that MMS authority is limited to marine-related activities already authorized.[15] It is especially important that MMS not ignore The Act's use of the word "authorized" to qualify "marine-related," because before the House-Senate conference committee marked up the bill's conference report, it specifically rejected the House version that did not include this language.[16]

A contrary interpretation of The Act would directly disregard this Administration's policy that the Commerce Department is to have lead authority to establish, implement and enforce a regulatory system for offshore aquaculture in the U.S. Exclusive Economic Zone.[17] This policy is reflected in its National Offshore Aquaculture Act, S.1195, introduced in June 2005, which awaits a hearing and has not been debated by Congress.

MMS should clarify that its new authority under The Energy Act does not include new rigs-to-reef or rigs-to-aquaculture permitting authority.

Finally, while one of the areas that MMS seeks comment on is "Managing end of life and facility removal," and MMS asks for ". . . options [that] MMS should consider as alternatives to facility removal[,]" we urge MMS to clarify that it does not interpret The Act to give it new authority to allow oil

[13]70 Fed. Reg. 77346 ("Although The Act authorizes MMS to permit alternate uses of existing OCS facilities, *MMS is not seeking the authority over activities such as aquaculture, but only the decision to allow platforms to be converted to such uses, if the appropriate agency approves the underlying activity*"(italics added)).
[14]*Id*. ("Although The Act authorizes MMS to permit alternate uses of existing OCS facilities, ...").
[15]It is likely that Congress intended the prior "authorization" required before the Secretary can issue leases, easements or rights-of-way for "marine-related" activities be specific to the particular activity, and not simply the authorizations found in other statutes, such as the River and Harbors Act (RHA) or Clean Water Acts (CWA), which authorize certain general uses (such as discharging pollutants) on the Outer Continental Shelf. Under The Energy Act, other activities for which the Secretary can grant leases, easements or rights-of-way on the Outer Continental Shelf must still obtain an RHA and CWA permits, but The Act only requires "marine-related" activities be "authorized."
[16]Compare P.L. 109-58, Section 388 to H.R. 6, Section 2010 (passed by the House on April 21, 2005).
[17]Remarks by Vice Admiral Conrad C. Lautenbacher, Jr., USN (Ret.), Undersecretary of Commerce for Oceans and Atmosphere, Transcript of the Press Conference Announcing the National Offshore Aquaculture Act of 2005, June 7, 2005, The National Press Club Washington DC, available at http://www.nmfs.noaa.gov/mediacenter/aquaculture/remarks.html#admiral

and gas platforms to be transferred for alternative uses, such as aquaculture or artificial reefs, in order for the original lessee energy companies to avoid removal requirements and escape liability (with so-called "rigs-to-reef or rigs-to-aquaculture" permitting).

Energy companies have long sought to avoid the costs of removing their existing platforms by circumventing requirements that they remove their structures within one year after production ceases. MMS should not take lightly the decision of whether to allow platforms to remain well after production ends. Far more evidence is needed that abandoned platforms serve as artificial "reefs" by contributing to larger, healthier fish populations.[18] Energy platforms can cause property and environmental damage when they are affected by storms, such as the recent Hurricanes Rita and Katrina, which severely damaged several offshore oil platforms and resulted in several rigs reported as missing. News stories report that since November 2005, at least three ships have collided with wrecked oil platforms in the Gulf, of Mexico with one incident resulting in one of the Gulf's largest oil spills.[19]

While The Energy Act may allow MMS to lease alternate activities on OCS facilities and may provide the MMS authority to deal with restoring this second lease,[20] it does not at all authorize the transfer or termination of original energy company leaseholders' interests. It also does not deal with liability issues from environmental, personal or property damages that might arise from modifying lease clearance requirements and allowing the platforms for aquaculture or artificial reef use.

Moreover, nothing in The Energy Act supersedes the Artificial Reef Act (ARA) and subsequent regulations that lay out the procedures for use of secondary-use materials as artificial reefs.[21] MMS has recognized the authority of the ARA in the past for oil and gas platform conversions.[22] Because nothing in The Energy Act supersedes the ARA or otherwise provides any new authority over artificial reefs, MMS should not be tempted to revisit its decommissioning requirements to establish a rigs-to-reef or rigs-to-aquaculture permitting program.

Conclusion

For these reasons, we urge MMS to formally adopt a policy that will disallow the use of OCS facilities in commercial offshore aquaculture; or, at the very least, maintain the position it articulated in the ANPR and clarify that The Act does not give it the authority to regulate "marine-related" activities until those activities have already been authorized by another agency or statute. We further urge MMS to

[18]Betsy Mason, Doubts Swirl Around Plan to Use Rigs as Reefs, *Nature*, October 30, 2003. *See* Carr, Mark H., McGinnis, Michael Vincent, Forrester, Graham E., Harding, Jeffrey, and Peter T. Raimondi. Consequences of Alternative Decommissioning Options to Reef Fish Assemblages and Implications for Decommissioning Policy. MMS OCS Study 2003-053. Coastal Research Center, Marine Science Institute, University of California, Santa Barbara, California. MMS Cooperative Agreement Number 14-35-0001-30758. 104 pages.

[19]Ben Raines, Broken Oil Rigs Danger in Gulf, Mobile Register, January 29, 2006.

[20]*See* Amended Outer Continental Shelf Land Act, P.L. 109-58, Section (p)(6)(C).

[21]*Id.,* Section (p) (9): "[n]othing in this subsection displaces, supercedes, limits, or modifies the jurisdiction, responsibility, or authority of any Federal or state agency under any other Federal law."

[22]In 2002, when MMS re-examined its decommissioning regulations, it determined that before any oil or gas structure could become an artificial reef, it must first become part of State artificial reef program and the responsible State agency must acquire a permit from the U.S. Army Corps of Engineers and accept title and liability for the structure. In the same rulemaking, MMS decided not to codify its entire rigs-to-reef policy in part because it received comments from a public interest organization, a citizen and a government agency that it did not have authority to manage the rigs-to-reef program. MMS also refused to address other uses, such as aquaculture for decommissioned platforms in that rulemaking. 67 Fed. Reg. 35398 (May 17, 2002).

clarify that its new authority under The Act does not include new rigs-to-reef or rigs-to-aquaculture permitting authority.

Sincerely,

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